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# Supreme Court of the United States

OCTOBER TERM, 1960

No. 688

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

*Petitioner,*

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,

*Respondents.*

## BRIEF FOR RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Statement

This brief is submitted on behalf of The First National City Bank of New York ("City Bank"), French American Banking Corporation ("French American"), and The Royal Bank of Canada ("Royal Bank"), in opposition to petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Cir-

cuit dated December 30, 1960 (P. A. 1, p. 18).* That judgment reversed an order of the United States District Court for the Southern District of New York (Judge Ryan) entered on May 16, 1960 (R. 93; P. A. 2, p. 11), which denied the Banks' motion to quash three subpoenas duces tecum served on them, in New York City, on March 15, 1960.

The three subpoenas ordered the taking of depositions and the production of voluminous records of bank accounts of twenty-two named persons and corporations covering a period of almost ten years (R. 16, 19, 22). They were issued by the Clerk of the District Court on behalf of petitioner, Manuel Aristeguieta, Consul General of the Republic of Venezuela, under the purported authority of the Federal Rules of Civil Procedure. The subpoenas were issued to obtain, by way of discovery, new and cumulative evidence for use in an extradition proceeding against Marcos Perez Jimenez, former President of Venezuela. The extradition proceeding was commenced by petitioner on behalf of the Republic of Venezuela, at Miami, Florida, before The Honorable William C. Mathes, a United States District Judge, sitting as an extradition magistrate.

From the sweeping demands of the subpoenas duces tecum and from the affidavit of Mr. Sidney S. Sachs, one of counsel for Venezuela, it is abundantly clear that Venezuela is attempting to institute a basic innovation which would permit it to conduct the equivalent of a

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* References:
"Pet." —Petition of Manuel Aristeguieta.
"R." —Record in the Supreme Court.
"P. A." —Petitioner's Appendix. There are five appendices to the Petition, each separately paginated.

grand jury inquisition in the United States in order to discover, here, new evidence against the defendant, Jimenez, and others. In paragraph 7 of his affidavit, sworn to November 25, 1959, Mr. Sachs states (R. 10):

> "The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the defendant and others, as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant."

Venezuela has failed to show any need whatsoever for this extensive inquisition. Indeed, it has rested its case in the extradition proceeding, thus indicating that the evidence already presented is sufficient.*

As justification for the drastic innovation sought, Venezuela nevertheless claims that denial of the further investigation would "gravely hamper the United States in performing its solemn obligations under the numerous treaties to which it is a party." (Pet. 27) But those treaties do not provide for or envisage such investigation. Venezuela has not pointed to a single instance in the history of this nation where discovery procedures, by subpoenas duces tecum or otherwise, have been used by a demanding country.

Moreover, the United States Department of Justice, in its briefs *amicus curiae* before the Courts of Appeals for the Second and Fifth Circuits and in its memoran-

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* That Venezuela has, in fact, rested its case against the fugitive appears from the transcript of the hearing in Miami, Florida, before Judge Mathes on May 10, 1960 (p. 56):

"The Court: Has the plaintiff rested yet?

"Mr. Sachs [Counsel for Venezuela]: Yes, we have rested. We now rest. . . ."

dum *amicus curiae* in this Court (in No. 77), has been unable to produce, from its vast archives covering almost 200 years, a single case in which the deposition and discovery procedures of the United States have been used by a demanding country.

Apparently, Venezuela is the only demanding country which has ever sought to use such discovery procedures, in the United States, to gather evidence of guilt of crimes committed in the demanding country, for use in an extradition proceeding. Certainly the alleged needs of one petitioner do not make an issue one of grave and general public importance, meriting review.

**The Facts**

For a detailed statement of all the background facts, we invite the attention of the Court to our brief in the Court of Appeals for the Second Circuit, filed herein as a part of the record. A summary of the particular facts here pertinent follows:

1. *Subpoenas Duces Tecum Issued in Miami.* On December 2, 1959 City Bank, French American and Royal Bank were each served in New York City with a subpoena duces tecum returnable in Miami, Florida, requiring the production of records of bank accounts of twenty-one named persons and corporations for the period March 14, 1949 to November 25, 1959 (R. 9, 28). These records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence.

Thereafter the Banks moved to quash these subpoenas in the United States District Court in Miami, and on December 15, 1959 an order was entered denying

their motion to quash (R. 32). On December 29, 1959 the Banks appealed from that order to the United States Court of Appeals for the Fifth Circuit.

2. *Subpoenas Duces Tecum Quashed.* On January 29, 1960 the Court of Appeals unanimously held, without opinion, that the order of December 15, 1959 was final and appealable, and a majority of the Court held that the order should be vacated and the subpoenas duces tecum quashed (R. 37). *Aristequieta* v. *Jimenez,* 274 F. 2d 206 (5th Cir. 1960).

Thereafter, in April 1960, Venezuela filed a petition in this Court for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit. This petition is still pending (*Aristeguieta* v. *The First National City Bank of New York, et al.,* No. 77, October Term, 1960).

3. *Subpoenas Duces Tecum Issued in New York.* On motion of Venezuela, Judge Mathes on March 9, 1960 entered an order in the extradition proceeding granting to Venezuela permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including the issuance of subpoenas duces tecum, to secure evidence from officials of the three Banks in New York City (R. 43).

On March 15, 1960, each Bank was served with a deposition subpoena duces tecum requiring its appearance on April 18, 1960 at the United States Court House, Foley Square, New York City, and the production of records of the bank accounts of twenty-two named persons and corporations for the period March 14, 1949 to June 30, 1958 (R. 16, 19, 22). These records are the same voluminous records sought by the earlier subpoenas referred to in paragraph 1 above.

4. *Subpoenas Duces Tecum Quashed.* The Banks moved in the United States District Court for the Southern District of New York to quash the subpoenas duces tecum served on March 15, 1960 (R. 7). On May 16, 1960 an order was entered denying this motion (R. 93; P. A. 2, p. 11). From this order the Banks appealed to the Court of Appeals for the Second Circuit, and that Court reversed the District Court in a judgment dated December 30, 1960 (P. A. 1, p. 18). Venezuela now seeks a writ of certiorari to review this judgment of the Second Circuit.

## POINT I

**The decision of the Court of Appeals, Second Circuit, was a correct determination on the facts and does not warrant review by this Court.**

The Court of Appeals did not decide "an important question of federal law which has not been, but should be, settled by this Court." The crucial question, as stated by the Court of Appeals, was one *of fact*: ". . . has Venezuela shown such exceptional circumstances as would justify the granting of the depositions it seeks." And in its determination of that issue of fact the Court held: "there is no present showing of need." We submit that the legal principles involved in the determination of that factual issue do not merit this Court's consideration (P. A. 1, pp. 16-17).

Venezuela argues, however, that this issue of fact was resolved incorrectly by the Second Circuit in that it substituted "its judgment for that of the district judge as to the sufficiency of the evidence already submitted and of that which petitioner seeks." (Pet. 21)

What the Court of Appeals did, however, was to examine the record to see if any showing of need had been made. And on the basis of that examination the Court ruled that there had been no showing of need. The record amply justifies this ruling. As the Court stated (P. A. 1, p. 17):

> ". . . If, as Venezuela has indicated, it is willing to rest its case upon the record already made, the additional evidence sought *would appear to be* merely cumulative. Nor has any *showing* been made as to *how* $4,400,000 will exceed in legal effectiveness, insofar as meeting the statutory requirement of over $200 is concerned, the $500,000 already claimed by Venezuela. Since *at this stage* there is no *present showing* of need, it would be unwise in the absence of more specific statutory command or direction to sanction such broad deposition proceedings as are now sought." (Emphasis added)

Venezuela complains that the "necessity" standard applied by the Second Circuit is too strict, citing cases arising under the Federal Rules of Civil Procedure (Pet. 18-21). Presumably Venezuela takes the position that, since the deposition subpoenas were issued by "analogy" to or were "patterned on" the Civil Rules, the degree of need which must be shown should also be derived from those Rules. But this contention ignores what the Court of Appeals clearly perceived: that an extradition proceeding has little similarity to ordinary civil litigation and is, on the contrary, closely analogous to a criminal proceeding before a committing magistrate (P. A. 1, p. 6).

Thus, the Court of Appeals likened the position of the demanding country in an extradition proceeding

to that of the United States in a federal criminal prosecution (P. A. 1, p. 14). And the Court pointed out that the United States as prosecutor "cannot avail itself of the deposition privilege made available to defendants by Criminal Rule 15." (P. A. 1, p. 14) Yet Venezuela claims that the observance of treaty obligations requires the United States to grant to demanding countries greater inquisitorial powers than the United States allows itself.

## POINT II

**Neither an extradition magistrate, nor a United States District Court purportedly acting in aid of extradition, has power to authorize or issue subpoenas duces tecum, or to authorize the use of discovery proceedings, on behalf of the demanding country.**

### I

1. Venezuela claims that the deposition and subpoena procedure here involved was "patterned on Rules 26 and 45 of the Civil Rules." (Pet. 15) This obfuscated language is used because the Civil Rules are obviously not applicable and the subpoenas could not, therefore, be issued "pursuant to" those Rules. As Rule 1 states: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . ." But an extradition proceeding is not a suit, case or controversy pending in any federal court.

Others have attempted to sustain a deposition and subpoena procedure "patterned on Rules 26 and 45"

in similar circumstances, but they have uniformly failed. Thus, the deposition and discovery procedures of the Civil Rules cannot be utilized by state-court litigants, *Beard* v. *New York Central RR.*, 20 F. R. D. 607 (N. D. Ohio 1957); or by parties to an administrative proceeding, *Amand* v. *Pennsylvania RR.*, 17 F. R. D. 290 (D. N. J. 1955); or by parties to an arbitration proceeding, *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F. R. D. 359 (S. D. N. Y. 1957).

Venezuela has failed to show why the deposition and discovery procedures it seeks should, despite such holdings, be available to the demanding country in a non-judicial proceeding before an extradition magistrate, who might be "any judge of a court of record of general jurisdiction *of any State*," as well as any federal judge or authorized commissioner. 18 U. S. C. § 3184.

2. The Federal Rules of Criminal Procedure apply neither to an extradition proceeding nor to a purported proceeding in a United States District Court in aid of extradition. For Rule 54(b)(5) provides: "These rules are not applicable to extradition and rendition of fugitives . . . ."

3. The Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698 (1923), contains no provision authorizing the use by the demanding country of discovery procedures in the country of asylum.

4. The statutes governing extradition (18 U. S. C. §§ 3181-95) are barren of any provision which authorizes the use by the demanding country of discovery procedures in the United States.

II

Moreover, it is indisputable that federal district courts are courts of limited jurisdiction and possess only such jurisdiction as Congress has, by statute, conferred upon them. *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir. 1957), *cert. denied*, 356 U. S. 960 (1958), *rehearing denied*, 357 U. S. 924 (1958).

No general power to authorize discovery or to issue subpoenas duces tecum inheres in a United States District Court. As with all other exercises of judicial power by a United States District Court, the power to issue subpoenas is limited to those situations in which Congress has conferred such power on the Court. *Janssen* v. *Belding-Corticelli, Ltd.*, 84 F. 2d 577 (3rd Cir. 1936).

Nor is such power conferred by the "all writs" statute (28 U. S. C. § 1651(a)), for that statute confers power only to *courts* and only "in aid of their respective jurisdictions." But an extradition magistrate is not a court, and a United States District Court has no jurisdiction over an extradition proceeding.

In short, the position of petitioner reduces to this: that the demanding country *ought to have* a sweeping power of discovery in the United States, and that such power must, therefore, be found somewhere, although petitioner has been unable to indicate any source of such power. But the recent decision of this Court in *Miner* v. *Atlass*, 363 U. S. 641 (1960), has foreclosed the argument that such power is an inherent power of a United States District Court.

For this Court held, in that case, that a United States District Court sitting in admiralty, has no in-

herent power to authorize deposition and discovery procedures, and that such procedures were "basic procedural innovations" which were beyond the District Court's rule-making power. If a United States District Court has no inherent power to authorize depositions and discovery and cannot do so by a properly adopted local rule, surely an extradition magistrate, acting only in an advisory capacity to the executive branch of the Government, lacks power to improvise and authorize such basic and far-reaching procedures. That Congress could ever have intended that a *state court judge,* as well as *federal* judges and commissioners, could use the deposition and discovery provisions of the Federal Rules of Civil Procedure to collect and assemble evidence throughout the nation is incredible.

## III

The basic principle and purpose of extradition precludes the use of subpoenas or of discovery in any form to support the request of the demanding country. For extradition presupposes that the demanding country will come to the asylum country with *prima facie* proof of criminality. No procedure is provided to permit the demanding country to use the judicial apparatus of the asylum country to collect and assemble there, proof of crimes allegedly committed in the demanding country's own territory. It is apparent, however, as we have shown from the affidavit of Sidney S. Sachs, *supra,* p. 3, that Venezuela seeks exactly that. The fact that no authority can be found anywhere to justify such procedure does not create an implication that the extradition magistrate may therefore improvise his own rules of discovery. Rather, it reinforces the conclusion that no power of discovery exists.

## POINT III

**The decisions of the Courts of Appeals for the Second and Fifth Circuits present neither conflict nor confusion.**

Venezuela asserts in its petition that the Second Circuit and the Fifth Circuit decisions, when considered together, have created abundant confusion in the field of extradition (Pet. 15-17). This is not so. Both courts have ruled that Venezuela's inquisitorial demands are improper, and this fact suggests consistency rather than confusion.

Nor do these two decisions result in any conflict between the Circuits with respect to questions of federal law. The legal issues decided by the two Courts are different. The Fifth Circuit proceeding raises the issue whether in an extradition proceeding pending in Miami, Florida, there is any power to issue, in Florida, the sweeping subpoenas duces tecum which were served in New York City and made returnable in Miami. That proceeding also raises the further question of the territorial limits of service of such subpoenas duces tecum.

The Second Circuit proceeding, on the other hand, involves the issuance of subpoenas duces tecum by the United States District Court for the Southern District of New York, and the use of deposition and discovery procedures, allegedly pursuant to the Federal Rules of Civil Procedure, in aid of the extradition proceeding pending in Miami, Florida. The proceeding in the Second Circuit does not, however, raise the question of the territorial limits of service of the subpoenas duces tecum.

Moreover, the Court of Appeals for the Second Circuit held that the crucial question in the case was one of fact: whether Venezuela had shown such exceptional circumstances as would justify the granting of the depositions. In its determination of that issue, the Court held that there had been no present showing of need. Similarly, in the Fifth Circuit proceeding Venezuela had made absolutely no showing of need, although its demands were equally sweeping. There is no conflict or confusion arising from the decisions of the two Courts.

## POINT IV

**The petition for a writ of certiorari should be denied.**

Dated: New York, N. Y.
February 27, 1961

Respectfully submitted,

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